IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1601

FOODSERVICE AND LODGING
INSTITUTE, INC., et. al.

Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR
F. RAY MARSHALL, SECRETARY OF LABOR

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Petitioner Foodservice and Lodging Institute, Inc., et. al. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 16, 1977.

OPINIONS BELOW

The Per Curiam memorandum of the United States Court of Appeals for the District of Columbia Circuit from which this review is sought is not reported and is printed in the Appendix, infra, pp A-2. The Order of the United States District Court for the District of Columbia from which the appeal to the United States Court of Appeals for the District of Columbia Circuit was taken is not reported and is printed in the Appendix, infra, pp A-6.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 16, 1977. Petitioner respectfully requests that the Court exercise the discretion vested in it by 28 USC 1254 (1) and grant the Writ of Certiorari.

QUESTION PRESENTED

Whether an Opinion Letter by the Administrator of the Wage and Hour Division, U.S. Department of Labor, to the effect that retail establishments which do not provide the characteristic employee services and physical equipment and furnishings that patrons require for the consumption of meals on the premises, are not restaurants for purposes of Section 13 (b) (8) of the Fair Labor Standards Act, is a final order ripe and fit for judicial review .

CONSTITUTIONAL, STATUTORY, and REGULATORY PROVISIONS

This Petition involves the foilowing Constitutional, statutory, and regulatory provisions:

United States Constitution, Article III, Section 2.

Fair Labor Standards Amendments of 1974, §13(b)(8) and §13(b)(18), PL 93-259;88 Stat. 64-65.

Administrative Ruling of Wage and Hour Administrator, Letter of May 1, 1975.

STATEMENT OF THE CASE

In 1974, Congress amended the Fair Labor Standards Act for the purpose of restricting the exemptions from its overtime payment provisions theretofore applicable to restaurant and foodservice employees. PL 93-259, 88 Stat. 58(1974).

Effective May 1, 1975, the amended law required employers to compensate employees of restaurants at a rate not less than one and one-half times the regular rate at which the employee is paid for all hours in excess of forty-six (46) in any workweek and to compensate foodservice employees of a retail or service establishment at a rate not less than one and one-half times the regular rate at which they are employed after forty-four (44) hours.

Effective May 1, 1976, this partial exemption from the normal forty (40) hour workweek for foodservice employees was repealed entirely while the forty-six (46) hour workweek for employees of restaurants remains.

Until May 1, 1975, the meaning of the term "restaurant" as used in Section 13(b) (8) of the Fair Labor Standards Act had little practical significance because the overtime exemption available for foodservice employees of retail or service establishments under Section 13(b) (18) was also clearly applicable to foodservice employees of all eating places whether such places were restaurants or not.

On March 4, 1975, Petitioner, a trade association comprised of restaurant and foodservice companies, wrote a letter to Respondent seeking an interpretive opinion to the effect that restaurants are retail establishments primarily engaged in the sale of prepared meals for immediate consumption either on the premises or by carry-out service.

On May 1, 1975, Respondent rejected Petitioner's request and replied to the effect that retail establishments which do not provide the characteristic employee services and physical equipment and furnishings that patrons require for the consumption of meals on the premises are not restaurants for purposes of Section 13(b) (8) of the Fair Labor Standards Act.

Petitioner brought suit on May 20, 1975 in the United States District Court for the District of Columbia, asking injunctive relief and a declaratory judgment to the effect that Congress intended the term "restaurant" as used in the Fair Labor Standards Act to include carry-out foodservice establishments. The Court's jurisdiction was predicated on 28 USC 1331 as the action arose out of the Fair Labor Standards Amendments of 1974, 88 Stat. 58, et. seq.

On September 30, 1975, the District Court agreed with Petitioner that "this case does present 'a case or controversy as contemplated in *National Automatic Laundry and Cleaning Council v. Schultz*, 443 F.2d 689 (D.C. Cir. 1971)' " but granted Respondent's Motion for Summary Judgment on the grounds that Petitioners "have failed to establish that the interpretive ruling and opinion letter challenged. . . . are plainly unreasonable or in conflict with the intent of Congress."

Petitioner sought review of this judgment in the United States Court of Appeals for the District of Columbia circuit. On February 16, 1977, the Court of Appeals vacated the District Court's Order without reference to the merits on the grounds that this matter was not presently suitable for judicial review and remanded for dismissal for want of jurisdiction.

REASONS FOR GRANTING THE WRIT

The Court Should Grant The Writ Of Certiorari Because The Decision Below Resolved A Federal Question Of Constitutional Significance In A Manner Not In Accord With The Applicable Decisions Of This Court.

The Court below relied upon this Court's decision in *Toilet Goods Association v. Gardner*, 387 U.S. 158 (1967). The *Toilet Goods* decision is not controlling and is readily distinguishable from this case.

The *Toilet Goods* Case involved a regulation which provided that the Department of Health, Education and Welfare could suspend certification service to Petitioners if Petitioners refused right of entry to the premises of Petitioners by agents of the Department of Health, Education

and Welfare. This Court held that the case "was not ripe for review because no hardship would occur to the Petitioners involved unless Petitioners in fact refused entry of agents of Health, Education and Welfare to the premises of Petitioners." In the event that certification service was suspended by the Government, judicial review would be immediately available without injury to Petitioners.

In this case, Petitioners collectively operate several thousand carry-out food establishments clearly without "the characteristic employee services and physical equipment and furnishings that patrons require for consumption of meals on the premises." These several thousand establishments operated by Petitioners collectively employ several hundred thousand persons.

Petitioners run the risk of substantial back wage liability and potential liquidated damages, and injunctions if they erroneously fail to pay overtime premiums required by the Fair Labor Standards Act after forty (40) hours in any workweek rather than after forty-six (46) hours. Moreover, the workweek of several thousand employees is being curtailed to forty (40) hours by employers seeking to avoid overtime penalties because of the uncertain status of employees of retail establishments primarily engaged in carry-out foodservice business.

The District Court was correct in holding that this case does present a "case or controversy" as contemplated in the *National Automatic Laundry* Case. Petitioners in this matter are suffering a present hardship, a day-to-day dilemma as to whether the forty (40) or forty-six (46) hour workweek applies to certain of their employees. It is such day-to-day dilemmas that the Declaratory Judgment Act was designed to eliminate.

This matter presents a pure question of law: Whether the interpretive ruling to the effect that retail establishments which do not provide the characteristic employee services and physical equipment and furnishings that patrons require for the consumption of meals on the premises are not restaurants for purposes of Section 13 (b) (8) of the Fair Labor Standards Act is in conflict with the intent of Congress.

A decision by the Court of Appeals on the merits would substantially curtail a multiplicity of litigation. Petitioners should not be required to litigate on a case-by-case basis how much on-premise consumption of food by patrons is required or how much physical equipment and furnishings is necessary for the Department of Labor to agree that a particular establishment is a restaurant within the meaning of Section 13(b) (8) of the Fair Labor Standards Act if in fact Congress intended the term "restaurant" to apply to retail establishments without regard to such qualifications.

Petitioners agree with the Court of Appeals that Respondent by its reply of May 1, 1975 to Petitioners, in apparent contrast to the literal terms of a pre-1974 interpretive regulation, conceded that consumption on the premises of all the food sold would not be considered to be an essential characteristic of every establishment qualifying as a restaurant. Respondent, however, clearly and finally denied the applicability of the restaurant exemption to several thousand exclusively carry-out establishments which do not provide the characteristic employee services and the physical equipment and furnishings that partrons require for consumption of meals on the premises.

As in the case of *Abbott Laboratories v. Gardner* 387 U.S. 136 (1967) this matter should be remanded to the United States Court of Appeals to review the Order of the United States District Court as to the merits of the issue.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 1977, three copies of this Petition For Writ Of Certiorari were served upon Respondent by hand delivery to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

THOMAS W. POWER, ESQ.
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Attorney for Petitioner

APPENDIX

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2265

Filed: February 16, 1977

Civil 75–0806

Foodservice and Lodging Institute, Inc., et al.,
Appellants

v.

U.S. Department of Labor, William J. Usery, Secretary of Labor
Appellees

Appeal from the United States District Court for the District of Columbia

Before:, DANAHER, Senior Circuit Judge, McGOWAN and TAMM, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause is hereby vacated and the case is remanded with directions to dismiss the complaint for want of jurisdiction, for the reasons set forth in the attached memorandum.

Per Curiam
For the Court
George A. Fisher
Clerk

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2265

Filed: February 16, 1977

Civil 75-0806

Foodservice and Lodging Institute, Inc., et al.,
Appellants

v.

U.S. Department of Labor, William J Usery,
Secretary of Labor
Appellees

Appeal from the United States District Court
for the District of Columbia

PER CURIAM MEMORANDUM

In 1974 Congress amended the Fair Labor Standards Act for the purpose of restricting the exemptions from its overtime payment provisions theretofore applicable to restaurant and food service employees P.L. 93-259, 88 Stat. 58 (1974). As the effective dates of such amendments approached, appellant Foodservice and Lodging Institute, a trade association comprised of a variety of food service enterprises, wrote a letter on March 4, 1975 in general terms to appellee seeking an opinion to the effect that a "restaurant" for purposes of the exempting provision, Section 13(b) (8), need only be engaged in serving food in final form to the ultimate consumer for immediate consumption either on or off the premises.

Appellee replied by letter on May 1, 1975, declining to accept without more the suggested definition. It pointed out that there are many variations in the services offered and the facilities used at food-serving establishments, and that while some may fall within the customary concept of a restaurant, others may not. It concluded by saying that whether a particular establishment "is a restaurant for purposes of section 13 (b) (8) depends on the facts in a particular situation." It purported to contemplate that, in apparent contrast to the literal terms of a pre-1974 interpretive regulation, consumption on the premises of all the food sold would not be considered to be an essential characteristic of every establishment qualifying as a restaurant. Without further recourse of any kind to appellee, appellants immediately filed suit in the District Court seeking injunctive relief.

In the District Court the Government moved to dismiss the complaint for want of jurisdiction, asserting that no controversy ripe for resolution had been tendered by reason of the failure of appellant Institute to present more precise factual situations as a basis for the ruling requested. The District Court denied this motion by reference to *National Automatic Laundry & Cleaning Council v. Schultz*, 443 F.2d 689 (D.C. Cir. 1971). It granted, however, the Government's motion for summary judgment addressed to the merits, holding that "plaintiffs have failed to establish that the interpretive ruling and opinion letter challenged herein are plainly unreasonable or in conflict with the intent of Congress." It accordingly denied pending motions for preliminary and permanent injunctive relief and dismissed the complaint with prejudice.

Our vacation of the District Court's order is not by reference to the merits–an issue we do not reach–but because we think the motion to dismiss should have been granted.

Unlike the District Court, we do not regard *National Automatic Laundry* as controlling. The administrative ruling under challenge in that case identified with particularity the nature of the activities declared to be subject to it, and left no room for more precise development or for a different disposition by further administrative examination. It was, in short, quite clear in that case that the administrator had taken a firm and final adverse position with respect to clearly identified activities; and there was no chance that further administrative consideration would have brought about a different result.

That is not true here. Appellant Institute's request was in the most general terms, and gave no tangible descriptions of the nature of the food service operations sought to be exempted. It presented rather a circumstance of the kind where, as we said in *National Automatic Laundry*, "... judicial review at too early a stage removes the process of agency refinement, including give-and-take with regulated interests, that is an important part of the life of the agency process." 443 F.2d at 703. We read the opinion letter under attack as far from foreclosing the possibility of rulings favorable to appellants with respect to particularized requests. The letter on its face disclaimed inflexibility with respect to the language of the pre-1974 interpretive bulletin, and plainly intimated that establishments where at least a substantial amount of the food was to be consumed off the premises could still qualify as a restaurant. It was implicit with invitation to seek further administrative guidance on the basis of specific facts—an invitation which was in fact made explicit by representations made to us at oral argument by Government counsel as to appellee's continuing readiness to provide such guidance.

Under these circumstances we think that, as the Supreme Court said in *Toilet Goods Association v. Gardner*, 387 U.S. 158, 164 (1967), judicial review "is likely to stand on a much surer footing in the context of specific application..." In the face of the flexibility readily discernible from the opinion letter, we think appellants were premature in their immediate recourse to the District Court, and that there was in this instance an unacceptably early rejection of the potentialities of the administrative process for either the accommodation or clarification of disputes.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION
No. 75–0806

FILED: SEPTEMBER 30, 1975

FOODSERVICE AND LODGING INSTITUTE, INC , et al.,

Plaintiffs

v.

JOHN T. DUNLOP, Secretary of Labor and U.S. Department of Labor,

Defendants

ORDER

Upon consideration of Plaintiffs' Motion for Preliminary and Permanent Injunction, Defendants' Motion to Dismiss or for Summary Judgment, and Oppositions thereto, and it appearing to the Court that this case does present a "case or controversy" as contemplated in *National Automatic Laundry and Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971), and it appearing further that Plaintiffs have failed to establish that the interpretive ruling and opinion letter challenged herein are plainly unreasonable or in conflict with the intent of Congress, it is this 30th day of September, 1975.

ORDERED that Defendants' Motion to Dismiss for lack of jurisdiction on the grounds that no case or controversy is presented be and hereby is DENIED; and it is

FURTHER ORDERED that Defendants' Motion for Summary Judgment be and hereby is GRANTED; and it is

FURTHER ORDERED that Plaintiffs' Motion for Preliminary and Permanent Injunctive Relief be and hereby is DENIED and this case is DISMISSED with prejudice.

/s/ Aubrey E. Robinson Jr.
Judge

UNITED STATES CONSTITUTION

ARTICLE III, SECTION 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;–to all Cases affecting Ambassadors, other public Ministers and Consuls;–to all Cases of admiralty and maritime Jurisdiction;–to Controversies to which the United States shall be a Party;–to Controversies between two or more States;–between a State and Citizens of another State;–between Citizens of different States;–between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may be Law have directed.

FAIR LABOR STANDARDS AMEMDMENTS OF 1974

The Provisions of Section 207 of this Title shall not apply with respect to–

13(b)(8)(A) any employee (other than an employee of a hotel or motel who is employed to perform maid or custodial services) who is employed by an establishment which is a hotel, motel, or restaurant and who receives compensation for employment in excess of forty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(B) any employee who is employed by a hotel or motel to perform maid or custodial services and who receives compensation for employment in excess of forty-six hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

13(b)(18) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs and who receives compensation for employment in excess of forty-four hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or–

ADMINISTRATIVE RULING BY WAGE AND HOUR ADMINISTRATOR

May 1, 1975

Thomas W. Power, Esq.
1666 K Street, N.W.
Suite 611
Washington, D.C. 20006

Dear Mr. Power:

This is in reply to your letter of March 4, 1975, concerning the application of the overtime provisions of the Fair Labor Standards Act to employees of restaurants and food service employees of other retail or service establishments.

The legislative history of the old section 13(a)(20) exemption indicates that its purpose was to provide, for food service employees of retail establishments which are not restaurants, an exemption equivalent to the exemption for restaurant employees. Thus, section 13(a)(20) included employees employed primarily in connection with the preparation or offering of food or beverages for human consumption either on the premises (as in a drug store) or by such services as catering, banquet, box lunch, or curb or counter service, or in clubs. It is clear that the activities named in section 13(a)(20) were to be exempt when *not* performed in a restaurant, as section 13(a)(2) contained the exemption for restaurant employees.

Amendments to the Act in 1966 did not change the language of section 13(a)(20) when it was replaced by section 13(b)(18) to provide only an overtime exemption; its

counterpart for restaurant employees was also an overtime exemption, section 13(b)(8).

It is our position that the current applicability of section 13(b)(8) and its counterpart section 13(b)(18) turns not on the primary function of the employer of selling prepared foods for immediate consumption, but on whether the establishment is a restaurant. As indicated in the breakdown you supplied of SIC major group 58, Eating and Drinking Places, there are many types of retail establishments that sell prepared foods and drinks for consumption on the premises or for immediate consumption. Among these are drinking places, social caterers, and ice cream and frozen custard stands, types of establishments that obviously are not restaurants. Restaurants are defined as "establishments engaged in serving prepared food and beverages selected by the patron from a full menu. Waiter or waitress service is provided and the establishment has seating facilities for at least 15 patrons".

Establishments primarily selling limited lines of refreshments and prepared food items, such as hamburgers, barbecued chicken and pizza for consumption on or near the premises, or for "take home" consumption, are designated as "refreshment places". Such establishments range from "carry outs" which have no seating facilities to establishments that have tables and booths, parking for eating in one's car, and "take-home" containers. Clearly, not all establishments in this group can be included as restaurants even if on practical considerations the term is extended beyond the SIC definition.

Whether or not a quick service food establishment is a restaurant for purposes of section 13(b)(8) depends on the facts in a particular situation. After careful consideration of

the principles stated in IB 779.387 and the Standard Industrial Classification, we are of the view that so-called quick service food establishments that do not provide the characteristic employee services and the physical equipment and furnishings that patrons require for consumption of meals on the premises are not "restaurants" for purposes of section 13(b)(8). On the other hand, where a particular quick service food establishment does provide the customary employee and dining room services, we would not deny the exemption. As in cafeterias, the fact that waiters and waitresses may not be employed would not alter this conclusion.

Sincerely,

/s/ Warren D. Landis
Acting Administrator
Wage and Hour Division

No. 76-1601

In the Supreme Court of the United States

OCTOBER TERM, 1977

FOODSERVICE AND LODGING INSTITUTE, INC., ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General.
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1601

FOODSERVICE AND LODGING INSTITUTE, INC., ET AL.,
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v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of the dismissal of their challenge to the Secretary's interpretation of an exemption to the Fair Labor Standards Act.

1. This dispute arose as result of an amendment to Section 13(b)(8) of the Fair Labor Standards Act adopted in 1974, 88 Stat. 64, 29 U.S.C. (Supp. V) 213(b)(8), that requires an individual employed "primarily in connection with the preparation or offering of food or beverage for human consumption" to be paid overtime compensation after working more than a 40-hour week, unless that individual is employed in a "restaurant." Persons employed in restaurants need not be paid overtime unless they work more than 46 hours in a week.[1] For purposes of the Fair

Labor Standards Act, the Secretary's definition of "restaurant" "means an establishment which is primarily engaged in selling at retail prepared food and beverages for immediate consumption on the premises" (26 Fed. Reg. 8365-8366).

The 1974 amendments reflected no congressional intent to broaden the longstanding administrative interpretation of the word "restaurant."[2] Nevertheless, on March 4, 1975, petitioners sent a letter to the Department of Labor asking that, in light of the amendments to the Act, the requirement that a "restaurant" serve food for consumption "on the premises" be deleted so as to bring carryout restaurants within the definition. By letter dated May 1, 1975, the Acting Administrator of the Wage and Hour Division of the Department of Labor responded that (Pet. App. A-11 to A-12):

> Whether or not a quick service food establishment is a restaurant for purposes of section 13(b)(8) depends on the facts in a particular situation. * * * [W]e are of the view that so-called quick service food establishments that do not provide the characteristic employee services and the physical equipment and furnishings that patrons require for consumption of meals on the premises are not "restaurants" for purposes

[1]Prior to 1974, Section 13(b)(8) provided that the maximum hours limitation of the Fair Labor Standards Act, which requires overtime to be paid if an employee works more than 40 hours per week, did not apply to employees of restaurants. Section 13(b)(18), 29 U.S.C. 213(b)(18), provided that the maximum hours limitations of the Act did not apply to "any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption * * *." In 1974, Congress repealed the Section 13(b)(18) exemption, effective May 1, 1974. The Section 13(b)(8) exemption for employees of restaurants was modified.

[2]This definition has remained virtually unchanged since 1961. It was refined in 1970, 35 Fed. Reg. 5856-5905, but the above-quoted language remained unchanged. See 29 C.F.R. 779-786.

> of section 13(b)(8). On the other hand, where a particular quick service food establishment does provide the customary employee and dining room services, we would not deny the exemption. * * *

Petitioner brought suit challenging the interpretation of the word "restaurant" embodied in the letter of May 1, 1975. The district court denied the Secretary's subsequent motion to dismiss, but granted his motion for summary judgment (Pet. App. A-6 to A-7). The court of appeals vacated the district court's judgment and remanded the case with instructions to dismiss for lack of jurisdiction, holding that the controversy was not ripe for resolution (Pet. App. A-1).

2. The court of appeals was correct in precluding premature litigation based upon general statements in an opinion letter of the Secretary. Judicial review "is likely to stand on a much surer footing in the context of a specific application * * *." *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158, 164. As the court of appeals stated (Pet. App. A-4):

> Appellant Institute's request was in the most general terms, and gave no tangible descriptions of the nature of the food service operations sought to be exempted. It presented rather a circumstance of the kind where, as we said in *National Automatic Laundry [and Cleaning Council* v. *Schultz*, 443 F. 2d 689 (C.A.D.C.)], ". . . judicial review at too early a stage removes the process of agency refinement, including give-and-take with regulated interests, that is an important part of the life of the agency process." 443 F. 2d at 703. We read the opinion letter under attack as far from foreclosing the possibility of rulings favorable to appellants with respect to particularized requests. The letter on its face disclaimed inflexibility with respect to the language of the pre-1974

> interpretive [*sic*] bulletin, and plainly intimated that establishments where at least a substantial amount of the food was to be consumed off the premises could still qualify as a restaurant. It was implicit with invitation to seek further administrative guidance on the basis of specific facts * * *.

Petitioners contend that they "run the risk of substantial back wage liability and potential liquidated damages, and injunctions if they erroneously fail to pay overtime premiums required by the Fair Labor Standards Act * * *" (Pet. 6). Petitioners, however, are free to request rulings from the Wage-Hour Administrator as to whether, in his opinion, *specific eating establishments* or categories of establishments, whose operations are described in detail, are "restaurants" within the meaning of Section 13(b)(8). As the court of appeals noted, the opinion letter does not foreclose "the possibility of rulings favorable to appellants with respect to particularized requests" (Pet. App. A-4). Since the opinion letter under attack here does *not* therefore require "an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance * * *," the court of appeals correctly concluded that the controversy is not ripe for adjudication. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 153.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JULY 1977.